NO. 21021

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEMCO DEVELOPMENT CO.,
a corporation,

An Alleged Bankrupt,

Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN.,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WEBB & WEBB

612 Jergins Trust Building
Long Beach, California 90802

Attorneys for Appellant

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CHRONOLOGY

Appellant was brought into Bankruptcy Court by Involuntary Petition which was subsequently Dismissed without adjudication thereon.

After said Dismissal, certain monies held by Receiver in Bankruptcy, as assets of Appellant, were ordered returned to Appellant, by the Referee in Bankruptcy.

Respondent, as a secured creditor herein, did, upon Application for Review of said Order of Referee, obtain reversal of portions thereof, including the award to Respondent of the remainder of those

monies held by said Receiver, by Order of the District Court.

Appellant did file objections to said District Court Order, and also to the findings of fact and conclusions of law in support thereof, alleging insufficiency of evidence to support said findings; findings fail to support the conclusions; and the record fails to support said District Court Order.

The District Court took no action upon said objections, and said findings, conclusions and Order were each signed, and entered herein.

Appellant prosecutes this Appeal from said Order of said District Court.

FROM THE RECORD

ERRATA ASSIGNED BY RESPONDENT

Respondent's Application for Review assigns as error, Paragraphs 3, 4, 5 and 6 (Tr. of Record pp. 101 and 102).

Paragraph 3. Said Referee's Order failed to find:

"That the Receiver stated in open Court that he would in effect sequester the rents by using them only for expenses of operating the properties, and pursuant thereto, Respondent agreed that a formal Order was not necessary."

Paragraph 4. Said Referee's Order failed to find:

"That certain other expenses relating to protection

of Respondent's interest in the subject property were paid prior to foreclosure sale."

Paragraph 5. Objects to the conclusion of Referee that any fees paid subsequently to foreclosure sale do not constitute valid claims against the funds held by Receiver.

Paragraph 6. Objects to awarding of payment out of Referee held funds, attorney's fees to Appellant's Counsel, and Appellant's Assignment to Malter.

MEMORANDUM RE ALLOWANCES
(Tr. of Record pp. 95 to 99)

Referee's Memorandum re Allowances decrees:

That the Involuntary Petition in Bankruptcy, which originated this matter, had been dismissed, and that Chapter X proceedings were filed, and also dismissed.

The Receiver holds more than $16,000.00 rental sums.

During pendency of proceedings, Respondent was restrained from proceeding with foreclosures. Finally, Respondent, by stipulation, waived any right for a deficiency judgment, provided Respondent be allowed to foreclose; and on Dec. 17, 1964, pursuant to said stipulation, the Court dissolved all restraining orders. Prior to Dec. 17, 1964, Respondent had filed application for sequestration of rents.

At final meeting of Creditors on November 4, 1965, Respondent contended that by terms of its deeds of trust, Respondent was entitled to the rental sums held by Receiver, and objected to payment of attorney's fees to Appellant's Attorney.

Appellant contended that since proceedings were dismissed, all funds should go to Appellant.

As far as this Court can determine from the evidence, at foreclosure sale, Respondent purchased the property for the full amount of its note, plus interest. There were certain amounts of taxes due and attorney's fees, but these were paid by Respondent subsequent to foreclosure sale.

The Court is of the opinion that any payments made by Respondent after foreclosure sale were made as purchaser.

Therefore, after the making of allowances, the balance of the funds should be returned to the Debtor (Appellant).

Allowances were made, including fees to Receiver, to the Attorneys for Receiver, to the Attorney for original Petitioning Creditor, and to Appellant's Attorney, the sum of $2,150.00.

Supplemental Order allowed Appellant's assignment of $2,000.00, payable out of funds to be returned to the Debtor.

FINDINGS OF FACT (SUMMARY)
(Tr. of Record pp. 110 to 118)

A summary of the District Court's findings of fact are:

Pursuant to Involuntary Petition in Bankruptcy against Appellant, alleged Bankrupt herein, a Receiver was appointed to

and did, collect and hold certain rents arising from real properties owned by Appellant, but subject to certain deeds of trust as security for promissory notes held by Respondent, a secured creditor, who petitioned for, but did not obtain, an Order herein to sequester certain of said rents.

Respondent was enjoined by restraining order herein, from proceeding with certain then pending foreclosures against certain of Appellant's real properties.

Chapter X proceedings were commenced, but subsequently Dismissed, wherein Respondent was enjoined from proceeding with any foreclosure against Appellant's real properties.

All restraining orders were dissolved by Order of Referee and a Judge of the above District Court, as to Respondent, who was thereby allowed to, and did, proceed with all of said foreclosures; all pursuant to Stipulation thereto by Respondent.

No Adjudication was ever made upon said Involuntary Petition, and Appellant moved for dismissal; at hearing thereon, Respondent stipulated to such dismissal and the Referee so ordered.

Appellant petitioned the Bankruptcy Court for an Order to compel the Receiver to turn over to Appellant all of the assets of Appellant, then held by said Receiver. Respondent filed objections, requesting said assets be turned over to Respondent.

After a hearing, the Referee ordered that after the making of certain allowances, including attorneys' fees, payable from out of said funds held by Receiver, the balance thereof should be returned to Appellant.

(Finding No. 11)

The Receiver represented in open Court that the rents would not become general assets, but would be held for benefit of Respondent. Respondent accepted, and it was acceptable to Referee, but no Order was made thereon. Neither Appellant nor his Attorney objected thereto.

(Finding No. 14)

See Tr. of Record p. 114, line 7.

(Finding No. 15)

The deeds of trust provide they are security for each agreement therein, including costs, expenses and Attorney's fees. The promissory notes provide for payment of one-fifth of one per cent on unpaid balance, upon default. Unpaid balance at time of default was approximately $3,750,000.00.

(Finding No. 16)

December 23, 1964, Respondent purchased the encumbered properties upon foreclosure sale, for a sum equal to principal, interest and trustee's costs, but not sufficient to cover certain fees, and default charge for a total of $19,100.00.

(Finding No. 31)

The record does not show any surplus as result of Trustee's Sale or by award to Respondent of Receiver held funds.

(Finding No. 32)

1. Respondent does not seek any deficiency under the deeds of trust, its claim is for funds which were held for its benefit pursuant to application for sequestration and Receiver's stipulation

thereon.

(Finding No. 33)

1. Respondent's filing of application for sequestration was sufficient to obligate the Receiver to sequester said rents, and was all that Respondent could do in the premises.

CONCLUSIONS OF LAW (SUMMARY)
(Tr. of Record pp. 118 and 119)

No. 1 holds: a. That Respondent was not estopped by entering into the stipulation of December 17, 1964, from asserting its rights to the monies held by Receiver; and did not waive its rights to make such claim.

No. 2 holds: a. Monies were held by Receiver for the benefit of Respondent;

b. Said monies were subject only to Receiver's fees and for services contributing to the creation of said monies;

c. Respondent was in constructive possession of the real properties. (Security for the trust deeds.)

No. 3 holds: a. Fees to Attorney for Bankrupt.

b. Balance of Receiver held funds to Appellant.

No. 4 holds: Respondent is entitled to Order of Reversal of those parts of the Order of Referee:

a. Awarding balance of funds to Appellant;

b. Honoring $2,000.00 assignment by Appellant;

c. Award of $2,150.00 fees to Appellant's Attorney.

ARGUMENT

RE: MONIES HELD BY THE RECEIVER

As Owner of the 101 parcels of real properties, Appellant was legally entitled to the rents therefrom.

The filing of the Involuntary Petition in Bankruptcy did not result in divesting Appellant of his title thereto.

The act of the Receiver in taking possession of the real properties, and collecting and holding the rents thereof, likewise did not effect a divestation of Appellant's title thereto.

Although upon the filing of Petition in Bankruptcy, all property in which the Bankrupt has an interest passes under the control of the Court, title thereto does not then pass; such title remains in the Bankrupt until the qualification of the Trustee.

Heffron v. Western Loan, 84 F. 2d 301 (9th Cir.).

A Receiver takes no title, he is a custodian to hold and preserve the property for the Bankrupt pending the time when it can be turned back to the Bankrupt upon dismissal of Petition, or if adjudication be denied, or to the Trustee if there be adjudication.

Lazarus v. Prentice, 234 U. S. 263;

Imperial Assn. Co. v. Livingston, 49 F. 2d 745.

After the filing of the Petition in Bankruptcy a defeasible title remains in Bankrupt.

Johnson v. Collins, 222 U. S. 538.

A Receiver is a custodian, holding the Bankrupt's property as an Officer of the Court, preserving it until it can be turned

back to Bankrupt if adjudication be denied, or turn it over to the Trustee, if adjudication results.

Clark v. Huckaby, 28 F. 2d 154.

A Receiver has no right, title or interest in those assets taken into his possession as such Receiver. A Receiver's powers are governed by the Bankruptcy Act; they are limited, and are not as broad as a Receiver in a general action in Equity. Such powers do not include the right to bargain away the property of or any interest therein of, the alleged Bankrupt, in relation to whom, the Receiver, stands as a fiduciary, entrusted with the care of and the preservation of, those said assets of said alleged Bankrupt.

Assuming that a formal Order for Sequestration had been issued by the Referee, such Order would not, of itself, convey any title therewith.

The result would be, to effect a "holding by Receiver, subject to claim of lien thereupon by Respondent, as additional security for the debt represented by the promissory notes, which were secured by said deeds of trust."

Such said claim of lien would be an issue, necessitating a determination thereof by a Hearing before the Referee.

No matter in what capacity Bankrupt may be holding the property, if Bankrupt has actual possession, custody or control, resort must be had to the Referee of the Bankruptcy Court to determine the equities therein.

Hebert v. Crawford, 228 U.S. 204.

Such powers may not be usurped by the Receiver.

A Hearing, with an opportunity to the claimant, and also to the alleged Bankrupt, to be heard, and to adduce evidence, is a necessary factor, and in the absence thereof, any determination thereon would be inequitable and void.

Respondent appears to rely almost entirely upon the District Court's Finding No. 11 (Tr. of Record, p. 113, lines 11-23).

By said finding, said Court merely determined a probative fact, to wit, that an agreement had been reached by and between the Receiver and the Respondent, sometime in November, 1964, to the effect that "said funds - would not become general assets subject to claims of creditors and would be held for the benefit of Respondent."

Assuming, which Appellant denies, that such said agreement was binding and effective, no greater interest or right in or to said funds would accrue in favor of Respondent than a formal Order for Sequestration would confer, that is, the subjugation of the funds for the purpose of satisfying those indebtedness secured by said 101 promissory notes and the 101 deeds of trust.

Upon such hypothesis, what indebtedness, if any, does Respondent assert? Apparently none, should effect be given to the District Court's Finding No. 32, that "Respondent is not seeking to recover any deficiency under the deeds of trust" (Tr. of Record, p. 118, lines 5-13). Appellant submits that no other theory would be legally sufficient to sustain Respondent's claim.

Respondent must establish itself as a creditor, with the right to resort to said funds as security for those specific indebted-

ness that arose pursuant to said 101 promissory notes and 101 deeds of trust.

Again, granting, which Appellant disputes, that Respondent had established the right to resort to said funds held by the Receiver prior to date of December 17, 1964, said Respondent did, by its stipulation, and confirmed by said Order of December 17, 1964 (Finding 14, Tr. of Record, p. 114, line 17).

> " . . . agree to limit the recovery of said secured indebtednesses to those real properties encumbered by said 101 deeds of trust, and to waive and forego any deficiency that may arise upon foreclosure thereof, as against -- Bankrupt (Appellant) herein."

Further, pursuant to said stipulation, said Order does decree:

> " . . . and it appearing to the Court to be in the best interests of the Estate of the within Bankrupt - (Appellant);
>
> "Be It Ordered - - - the parties having stipulated - to limit the recovery of said secured indebtedness to those real properties encumbered by said 101 deeds of trust, and to waive and forego any deficiency that may arise upon foreclosure thereof - Be It Ordered - all Orders - enjoining - Respondent - be and are dissolved, dismissed and discharged, to allow - Respondent, to pursue foreclosure proceedings upon the 101 promissory

notes secured by said 101 deeds of trust only."

District Court's Finding No. 14 (Tr. of Record, p. 114, lines 7-27).

The record would compel such a finding, had none been made thereon (Tr. of Record, pp. 47 to 51).

Such a finding confirms a prior Order of adjudication upon Respondent's claim, and said prior Order was and is res judicata of Respondent's said claim.

That the assets of said alleged Bankrupt (Appellant) did consist wholly of the 101 encumbered real properties, plus those funds in the possession of the Receiver only, so that in decreeing that it appeared to the Court to be in the best interests of the estate of said Bankrupt to permit foreclosures against said real properties could mean only that the Bankruptcy Court was referring to said funds in the possession of the Receiver, and the sole purpose of such said Order was to preserve to said Bankrupt and his general creditors those said Receiver held funds.

A compromise is addressed to the sound discretion of Referee and will not be disturbed unless abuse of discretion appears.

In re S. F. Brothers Co., 151 F. Supp. 153.

Compromise: Bankruptcy Act, Sec. 50. Compromise. The policy of the law is to encourage settlement.

After affirmance of Referee's Approval of Compromise by the District Court, the Order will not be reversed unless discretion

has been abused.

Florida Tlr. v. Deel, 284 F. 2d 567.

Approval of a Report and Order of Referee rests in sound discretion of District Judge. A Reviewing Court will not disturb or set aside a compromise unless it achieves an unjust result.

In re Albert Harris, Inc., 313 F. 2d 447.

Where Party has subjected himself to jurisdiction of Referee through participation in compromise, he is bound thereby.

In re Sherman Plastering Corp., 340 F. 2d 915.

One cannot escape agreement to compromise without return of consideration received.

U. S. for Use & Benefit of Kirbys v. So. Contractors, 211 F. Supp. 537.

RE: RES JUDICATA

From time of filing of Petition, Bankrupt's assets are in custodia legis, and Bankruptcy Court has exclusive jurisdiction and sole right to determine validity of any and all alleged liens thereon.

In re Ripp, 242 F. 2d 849.

Party who enters into agreement before Referee thereby subjects himself to Bankruptcy Court's summary jurisdiction as to entire dispute over enforcement of agreement.

In re Sherman Plastering Corp., 340 F. 2d 915.

During pendency of Involuntary Bankruptcy proceedings,

it was proper for claimants to appear therein (in Bankruptcy Court) to claim ownership of property in alleged Bankrupt's possession and request that property be released to them, and should Court on hearing establish property belonged to alleged Bankrupt, such determination would be res judicata in any subsequent proceedings.

In re Abbott Kinney Co. (Cal.), 66 F. Supp. 841.

Where Creditors may not be able to support act of Bankruptcy upon filing of Involuntary Petition, while proceedings were in Bankruptcy Court, that Court was a court of competent jurisdiction to determine matters pertaining to alleged Bankrupt's property and property found in its possession, and Bankruptcy Court had jurisdiction to determine ownership of monies.

Referee in Bankruptcy has authority to pass upon claims of Bankrupt and Bankrupt's Creditors, each vs. other, even though Creditor's claim was not at one time liquidated.

In re S. F. Brothers Co., 151 F. Supp. 150.

RE: JURISDICTION OF DISTRICT COURT JUDGE

An Order or Decree of a District Court Judge is binding upon all other Judges of such said District Court, so long as it remains, and unless and until it be vacated or set aside.

It is res judicata of all those matters ruled upon therein. Consequently, should another Judge of such said District Court, by subsequent Order, without such said prior Order having been

set aside or vacated, Decree contrawise upon said matters resolved by such said prior Order, then that said subsequent Order would be null and void, as being an attempt to adjudicate without having jurisdiction of the subject matter.

It is axiomatic, that when two authorities of equal powers render a Decision upon the same matter, the first in time prevails. The Referee's Order of Dismissal of the Involuntary Petition in Bankruptcy herein, dated February 16, 1965, shows on its face (Tr. of Record, p. 58):

1. Dismissal of Involuntary Petition in Bankruptcy;

2. Dismissal of Petition in Intervention;

3. Covenant by Respondent to pay certain of the Creditors of Appellant;

4. Termination of all other matters of said Bankruptcy, except an accounting by the Receiver;

5. Approval of said Order as to form by Respondent.

After a Dismissal of a Petition in Bankruptcy, the Bankruptcy Court was without jurisdiction to adjudicate controversies; but does retain jurisdiction to make allowances.

Love B. Woods Co., 222 F. Supp. 160.

Issues between Creditors and Debtor do not survive the Dismissal. Court was without jurisdiction to adjudicate Creditors' disputed claim, or determine the validity thereof.

Assoc. El. of Omaha, 288 F. 2d 683;

11 U.S.C.A. 95 Sub. b.

Dismissal left Bankruptcy Court with nothing upon which its

juris could operate insofar as counterclaim be concerned.

Love B. Woods Co., 227 F. Supp. 162.

Upon a Dismissal of an Involuntary Petition in Bankruptcy, that property in the hands of the Receiver should be turned over to the alleged Debtor. The Appellate Court will so Order.

In re Terry, 97 F. Supp. 635.

Appellant submits that said Dismissal of the within matter, to which Respondent stipulated, "terminated all matters, save an accounting by the Receiver". Respondent should be estopped thereby, from pursuit herein of Respondents within claim.

RE: FINDINGS OF DISTRICT COURT

A Summary of the findings of the District Court are set out hereinbefore in this Opening Brief.

Respondent relies on findings Nos. 11, 15, 16, 31, 32 and 33 to support its claim to the funds held by the Receiver.

In amplification of the effect of said Stipulation of the Respondents and Order pursuant thereto, dated December 17, 1964, it appears abundantly clear therefrom, that:

> Respondent was released out of the Bankruptcy Court, and allowed to pursue those particular security assets which, and in the manner which, Respondent had selected, all without any supervision of or control by, said Court.

Respondent did accept the benefits thereof, by pursuit of

and the consummation of, such said foreclosures.

Finding No. 11, if acceptable, merely recites an alleged probative fact; it would merely result in an "ear-marking" of the Receiver held funds as "subject to Respondent's right to assert his claim to resort to said funds to satisfy his alleged indebtednesses as secured by the notes and deeds of trust, upon PROOF OF RIGHT OF LIEN thereon, by a Hearing before the Referee." No such Hearing was ever held, and none appears to have been sought.

Finding No. 15 refers to purported contractual obligations set out in said notes and deeds of trust, as security for certain obligations of indebtednesses.

Finding No. 16 recites the fact of foreclosure sale resulting in obtainment of proceeds sufficient in amount to satisfy certain indebtednesses secured by said notes and deeds of trust, but not sufficient in amount to satisfy other claimed secured indebtednesses.

Such finding determines as an ultimate fact, that a deficit did remain following said foreclosures, and was unsatisfied.

Any such deficiency sum that might occur or remain by reason of said foreclosures was waived by Respondent by its Stipulation.

Finding No. 31 recites the failure of the Record to show a surplus, should the funds held by the Receiver be awarded to the Respondent; also, that there is nothing in the Record to show such surplus as having arisen from the foreclosure sale.

Such a finding connotes a conclusion by the District Court

that, "a deficiency sum did arise or remain out of or by reason of, such said foreclosure sale."

Finding No. 32 is a "finding" that is contradicted by the record herein. It appears to be an attempt to avoid the fact of an effort to satisfy unpaid indebtednesses that remained unpaid after foreclosure by reason of inadequacy of proceeds obtained by sale by foreclosure, merely by evading the term "deficiency". What is a deficiency, other than a lack of or inadequate amount of that substance necessary to accomplish the result sought? In the instant case, whether it be termed money, cash, currency, coin of the Realm or, in the vernacular, "the green stuff", no one would be misled by such selective verbiage, from recognizing the real objective sought to be identified by said Stipulation and Order of date of December 17, 1964, that is, to henceforth keep the hands of Respondent out of Appellants assets.

Finding No. 33, is a conclusion of law. It is erroneous. Respondent did, pending Bankruptcy proceedings, have the right to a Hearing before the Referee, to establish, if he could, his claim for sequestration of said funds. Respondent apparently chose not to obtain such said Hearing. Respondent pleads that he relied upon the Receivers representations. A Receiver does not represent an Alleged Debtor to the extent that said Receiver can deal away the rights of such said Alleged Debtor, by stipulation or otherwise. The record herein shows that Appellant, the Alleged Debtor herein, was at all times herein, represented by Counsel.

Affidavit of Respondent's Counsel states, "There is no

surplus, -- there was and is a substantial deficit. For this reason, the funds in the hands of the Receiver belong to and should be paid to, Community." (Tr. of Record, p. 89, lines 3-6).

RE: DISTRICT COURT ORDER WITHOUT EVIDENTIARY SUPPORT

The Hearing before the District Court was upon the Referee's Certificate and papers submitted, Briefs of Counsel and Argument of Counsel, as appears from the Findings of Fact of said District Court (Tr. of Record, p. 110, lines 24-28), and the Order herein Appealed from (Tr. of Record, p. 121, lines 22-27).

The Record shows no transcript of evidence presented to the Referee, at the Hearing upon Appellant's Motion for an Order to compel the Receiver to turn over Appellant's assets to Appellant, and Respondent's counter-Motion; and Appellant submits that there was none such.

Findings Nos. 15, 16 and 31 are apparently based upon that certain affidavit by John Endicott, of Counsel for Respondent, to which reference is made in said Findings Nos. 15 and 16, to wit: "Affidavit filed November 23, 1965, page 3, lines 1-29", (Tr. of Record, p. 115, lines 8 and 9), and, "Affidavit, filed November 23, 1965, pages 2 and 3" (Tr. of Record, p. 115, lines 27 and 28). Said Affidavit appears in the Transcript of Record herein, upon pages 86, 87, 88 and 89. Said Affidavit was also presented to the Referee, at said Hearing resulting in the Referee's Memorandum re Allowances and Supplement thereto, and apparently,

the said Referee chose to disregard said Affidavit, as incompetent evidence, probably due to Objections raised thereto by Counsel for Appellant herein, at said Hearing before said Referee. Said Objections were upon "Hearsay" (Tr. of Record, p. 91, lines 17-25). Said Objections refer to page 1, lines 25 and 26 of said Affidavit. See page 86, lines 25 and 26, of the Transcript of Record herein. Said Affidavit shows on its face that the Deponent is merely reciting data, and not facts within Affiants personal knowledge. Had such related matters been within the personal knowledge of said Affiant, certainly he would not have "made an investigation to determine", as he states in said Affidavit.

Appellant directs the attention of the District Court of Appeals to "Alleged Bankrupts Reply Brief", Transcript of Record herein, pages 91, 92 and 93, including Points and Authorities cited therein.

Where examination of an affidavit discloses that statements therein are upon information and belief, such is hearsay, and not proof of the facts stated therein.

Bank of America v. Williams, 89 Cal. App. 2d 21.

Thus, we find said District Court Findings Nos. 15, 16 and 31 without evidentiary support.

RE: CONCLUSIONS OF LAW

No. 1 is clearly erroneous, and contrary to the record. The prior Order of December 17, 1964, Decreed that said

Respondent had "Waived its rights", and thereafter, estoppel would result.

No. 2. Assuming such conclusions might have been proper, as to times prior to December 17, 1964, and the inception of said Stipulation and Order pursuant thereto (which Appellant denies), the effect of said Stipulation and Order would necessitate that these "conclusions", which appear more to be "ultimate facts", be stricken as without support in the record.

No. 3. After Dismissal, the Referee does have jurisdiction to make and determine allowances, including Attorney's fees.

Referees award of balance of Receiver held funds to Appellant is mandatory, upon the face of the record herein.

No. 4. Award of funds to Appellant is required, by law.

Honoring of the $2,000.00 assignment by Appellant was made specifically payable from out of monies to "go to Appellant". Respondent cannot complain of such directive.

Referee had jurisdiction to allow fees to Appellant's Counsel.

RE: ORDER APPEALED FROM

Paragraph 1 of said Order is made without support of and contrary to, the record herein.

No. 2. The holding as erroneous the Referee's Orders as set out therein, would properly be a "conclusion of law", however, such cannot be sustained as "the law".

A District Court cannot reverse the findings of a Referee

if there be reasonable basis in the record for such findings.

In re Arbycraft Co., 288 F. 2d 553.

No. 3. The statement that "the funds in the hands of the Receiver belong to (Respondent)", is a conclusion of law. The record fails to support such a statement. On the contra, it appears throughout the record, that title to said funds was in the Appellant, remained therein during Receiver's possession thereof, pending Bankruptcy proceedings, and was not divested therefrom up to and including the time of Dismissal of the Involuntary Petition in Bankruptcy herein. No title was ever acquired by the Respondent, prior to said Dismissal, and none such was asserted by said Respondent to and including Hearing upon Appellant's Motion for turnover Order of Appellant's assets then in possession of the Receiver, wherein Respondent sought to have said assets turned over to Respondent, on the theory of an unsatisfied creditor. The Bankruptcy Court was without jurisdiction to Hear and determine conflicting claims to those assets of the Estate of Appellant as an Alleged Bankrupt then held by the Receiver, said Dismissal having been theretofore made and entered.

A District Court must accept the Referee's findings of fact, unless clearly erroneous.

In re Sadler, 104 F. Supp. 886.

A reviewing Judge must accept Referee's findings, unless they be clearly erroneous, and where substantial evidence appears, they could not be held clearly erroneous. Gen O. 47, Sec. 53.

Rasmussen v. Grisley, 77 F. 2d 252.

TRUE ERRATA

The only genuine error to be found in the Memorandum of Allowances of the Referee is in assessing the Costs to the Estate of the Appellant. Such said Costs should have been taxed to the Petitioning Creditors, after the Dismissal.

Sec. 69, sub. b, and 50, sub. n,

Liability on Dismissal.

An alleged Debtor, whose petition against him has been Dismissed, is not liable for Costs.

In re Childs, 52 F. Supp. 89.

Upon Dismissal of an Involuntary Petition in Bankruptcy, the alleged Debtor shall recover his Costs from the Petitioner.

General Order 34, following 11 U. S. C. A. Sec. 53.

Bankruptcy Court retains jurisdiction to tax Costs to the Petitioning Creditors, where Involuntary Petition be Dismissed.

In re Childs, supra.

One unjustly petitioned into Bankruptcy can recover his Counsel fees pursuant to 78-n, upon Dismissal.

In re Childs, supra.

11 U. S. C. A. Sec. 109, Receivers taking possession shall furnish Bond. Sub. b. If Petition be Dismissed, the Court shall allow to Bankrupt, to be paid by obligors on such Bond, his Costs, Counsel fees, expenses and damages occasioned by such seizure, taking or detention of his property. Sub. n, Sec. 78, of this title. Petitioning Creditors are liable, though no Bond be given. General

Order 34, following Sec. 53, provides Costs and fees be assessed against unsuccessful parties.

In re Love B. Woods, 222 F. Supp. 161.

The District Court of Appeals will remand a matter to the Referee, or to a lower Court, with Directions to terminate the Receivership, take an accounting from the Receiver, fix his compensation, turn over to Debtor assets held by Receiver, tax Costs in accordance with the law applicable, where an Involuntary Petition in Bankruptcy is commenced, and it not be established that the alleged Debtor is in fact insolvent.

In re Terry, 97 F. Supp. 635.

In case of a Dismissal of an Involuntary Petition in Bankruptcy, Costs shall be assessed against the unsuccessful Petitioning Creditors.

In re St. Lawrence Milk Co., 9 F.2d 896.

SUBMISSION

Wherefore, Appellant submits, that the within matter should be remanded to the Bankruptcy Court, with Directions to turn over to Appellant the funds in the possession of the Receiver, to re-affirm the Referee's Memorandum re Allowances whereby fees were fixed for Counsel for Appellant, and to fix additional fees for said Counsel for Appellant by reason of this Appeal, and to tax such said fees, all Costs herein, and damages and expenses of Appellant against the Bond of the within Receiver and also

against the unsuccessful Petitioners herein, including Respondent, all pursuant to the Statutes relevant thereto.

Respectfully submitted,

WEBB & WEBB

By: JAMES C. WEBB

Attorneys for Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James C. Webb

JAMES C. WEBB